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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. B) is reported at 360 F. Supp. 643. The memorandum opinion of the district court granting appellee's motion for a preliminary injunction (J.S. App. A) is reported at 350 F. Supp. 167.

JURISDICTION

The judgment of the three-judge district court (J.S. App. D), enjoining the discharge of appellee Ballard, was entered on July 18, 1973. A notice of appeal was filed on August 14, 1973 (J.S. App. E). The government's motion for a new trial, filed July 6, 1973 (J.S. App. C), was denied on August 23, 1973 (J.S. App. F). A second notice of appeal was filed on September 20, 1973 (J.S. App. G). The jurisdictional statement was filed on November 13, 1973, and probable jurisdiction was noted on February 19, 1974. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the district court erred in using the "compelling governmental interest" test, rather than the "rational basis" test, in reviewing the constitutionality of military statutes creating differences in personnel administration based on sex.

2. Whether the differences in the Naval attrition statutes relating to men and women lieutenants (10 U.S.C. 6382 and 6401, respectively) are in violation of the Constitution.

STATUTES INVOLVED

10 U.S.C. 6382 provides in relevant part:

> (a) Each officer on the active list of the Navy serving in the grade of lieutenant * * * shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander * * * for the second time.

10 U.S.C. 6401 provides in relevant part:

> (a) Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant * * * shall be honorably discharged on June 30 of the fiscal year in which—
>
> (1) she is not on a promotion list; and
>
> (2) she has completed 13 years of active commissioned service * * *.

STATEMENT

The appellee, Lieutenant Robert C. Ballard, U.S.N., having twice failed of selection for promotion to lieutenant commander, was scheduled for discharge from the Navy no later than June 30, 1972, pursuant to the mandatory requirement of 10 U.S.C. 6382(a). That statute is a typical one requiring thinning of the ranks to retain the best qualified officers and to permit orderly promotion of lower ranking officers.[1] Although Lt. Ballard's performance of his duties was satisfactory, he was considered to be in the lower 15 to 30 percent of eligible lieutenants by two separate selection boards, and was not recommended for promotion (App. 24a). Hence, he became subject to the mandatory discharge requirement of 10 U.S.C. 6382. As an officer discharged under

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[1] See *infra*, pp. 12-17.

10 U.S.C. 6382, Lt. Ballard would be entitled to $15,000 severance pay. 10 U.S.C. 6382(c).

On June 16, 1972, Lt. Ballard filed suit in the district court, alleging that 10 U.S.C. 6382 was unconstitutional in requiring his discharge after (in his case) some nine years of commissioned service, whereas 10 U.S.C. 6401(a) required discharge of women Navy lieutenants not on a promotion list only after 13 years of commissioned service.[2]

A three-judge court, convened under 28 U.S.C. 2282, granted a preliminary injunction enjoining appellee's discharge pending a final decision[3] (J.S. App. A). Following presentation of additional affidavits and other documents, and a hearing, the court concluded that the 13-year selection out provision of 10 U.S.C. 6401 favors women Navy officers and constitutes an invidious discrimination against male Navy officers mandatorily discharged under similar conditions before completing 13 years of service (J.S. App. B, p. 19a). The court, citing *Frontiero* v. *Richardson*, 411 U.S. 677, held that the "compelling governmental interest" test applied, and that the differences between 10 U.S.C. 6382 and 6401 were not supported by any compelling interest perceptible to it.[4] The court enjoined the government from dis-

[2] See *infra*, pp. 17-19.

[3] A temporary restraining order had previously been entered on June 20, 1972.

[4] The district court also found that there was no evidence of a rational basis for the added tenure granted women officers. J.S. App. B, p. 18a. See *infra*, p. 7, n. 9.

charging Ballard "solely because of passovers in grade as provided for in Section 6382 prior to the expiration of 13 years of commissioned service * * *" (J.S. App. B, p. 20a, J.S. App. D, p. 23a).

After the court issued its written opinion (on June 26, 1973), and prior to the entry of its judgment (on July 18, 1973), the government on July 6, 1973 filed a motion for a "new trial" (J.S. App. C, pp. 21a-22a), and two additional affidavits.[5] This affidavit pointed out that, of a total of 71,689 officers on active duty in the Navy (as of November 1972), 68,456 were men and only 3,233 were women (App. 17a, 25a-26a); that all male Navy lieutenants in the Regular Navy (numbering 16,585) would be guaranteed a 13-year tenure if the court's order should be followed and upheld (App. 17a);[6] that there are only 167 women lieutenants in the Naval service who could be subject to 10 U.S.C. 6401(a) (App. 17a);[7] that the 13-year selection out provision in

[5] Affidavit of Capt. E. R. Fink, JAGC, U.S.N. (App. 16a-26a); Affidavit of Rear Admiral G.E.R. Kinnear, U.S.N. (App. 26a-29a).

[6] Some 238 lieutenants were subject to mandatory discharge under 10 U.S.C. 6382 on June 30, 1972, 31 of whom were granted, after discharge, reserve appointments and retained on active duty pursuant to long-established policy within the Navy to retain officers who are within two years of retirement eligibility. Forbes affidavit (App. 9a).

[7] Women officers on active duty numbered 3,233 (as of November 1972). Of these, 733 were women line or staff appointees, regular (504) or reserve (229); and 2,500 were women members of the Nurse Corps or other integrated staff

10 U.S.C. 6401 for women lieutenants presently has the effect of counteracting other traditional barriers to full participation and promotional opportunity for women officers in the Naval service, including previous size and promotion limitations,[8] and continuing restrictions against service by women on combatant vessels and aircraft, 10 U.S.C. 6015 (App. 23a-24a); that if equalization should be absolutely required, a more appropriate form of equalization in terms of overall needs of the service would be to eliminate altogether the 13-year provision and open up more Navy positions to women officers, thus creating more promotional opportunity for women officers, rather than create an across-the-board 13-year selection out provision for all male Navy lieutenants (App. 22a, 25a); and that, because of fiscal limitations, the immediate effect of the court's order, if followed in related class action litigation, could be to jeopardize the retention (through the end of the present fiscal year) of 630 lieutenants (junior grade) (App. 24a-25a).

The court denied the government's motion for a new trial (J.S. App. F, p. 27a).

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corps, regular (702), temporary (1), or reserve (1,797). Fink affidavit (App. 25a-26a).

The Department of the Navy has provided statistics concerning the number of officers (male and female) serving on active duty as of September 30, 1973. We have included these statistics in Table I, *infra*, p. 21.

[8] See *infra*, p. 19, n. 28.

ARGUMENT

I

STATUTORY CLASSIFICATION BY SEX IS CONSTITUTIONAL IF RATIONALLY RELATED TO REASONABLE AND LEGITIMATE GOVERNMENT OBJECTIVES

The district court held that the difference in selection out rules for men and women officers was unconstitutional because it was not justified by a compelling government interest.[9] For its conclusion that such a compelling interest is required, the district court relied heavily on the opinion of four justices in *Frontiero* v. *Richardson*, 411 U.S. 677 (J.S. App. B, pp. 17a-19a). That such a showing is not required is now clear from the subsequently rendered decision in *Kahn* v. *Shevin*, No. 73-78, decided April 24, 1974. That case involved an effort by a male plaintiff to extend to himself the benefit[10] of a legislative provision which had the effect of offsetting

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[9] The court also found no "evidence of any facts supporting * * * a rational basis" (J.S. App. B, p. 18a). The reasons supporting the classification here which were not fully presented to the court prior to the Motion for a New Trial (J.S. App. C, pp. 21a-22a) are set out in Part II of this brief, *infra* pp. 11-19.

[10] We note that Section 6401 is not a "benefit" to all women officers. Women lieutenants subject to Section 6401 who have been passed over twice at nine years, and wish to leave the service immediately with severance pay (up to $15,000), cannot because they have not completed 13 years of commissioned service. To these officers Section 6401 is a "detriment." Cf.

social disabilities of women. In an opinion of six justices this Court held that such a statute is constitutional if it " 'rest[s] upon some ground of difference having a fair and substantial relationship to the object of the legislation.' " Slip op. at 4. Because, as we demonstrate in Part II of this brief, such considerations are present here, the decision of the court below was in error.

The decision of this Court in *Kahn* upheld a statutory $500 exemption for widows but not for widowers. It is in accord with a long line of this Court's decisions. *Muller* v. *Oregon*, 208 U.S. 412 (upholding State statute that limited women's working hours); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (upholding State statute that fixed minimum wages for women but not for men); *Goesaert* v. *Cleary*, 335 U.S. 464 (sustaining State statute that forbade the employment of some women as bartenders); *Hoyt* v. *Florida*, 368 U.S. 57 (upholding State statute that relieved women of jury duty unless they volunteered); and *Williams* v. *McNair*, 401 U.S. 951, affirming 316 F. Supp. 134 (D. S.C.) (permitting State to provide separate branches for male and female college students).[11]

Two v. *United States*, 471 F.2d 287 (C.A. 9), certiorari denied, 412 U.S. 931.

[11] See also *Gruenwald* v. *Gardner*, 390 F.2d 591 (C.A. 2), certiorari denied, 393 U.S. 982 (sustaining disparity in federal social security retirement benefits favoring women); *Eslinger* v. *Thomas*, 476 F. 2d 225 (C.A. 4) (invalidating State resolution barring females from serving as Senate pages); *Robinson* v. *Board of Regents*, 475 F. 2d 707 (C.A. 6), certiorari denied, No. 73-221, May 13, 1974 (sustaining State college curfew requirement applicable only to females); *Miskunas* v. *Union Carbide Corp.*, 399 F. 2d 847 (C.A. 7), certiorari denied, 393 U.S. 1066 (sustaining State common law rule giving consortium cause of action to men but not women); *Brenden* v. *Independent School District*, 477 F. 2d 1292 (C.A. 8) (invalidating State rule preventing girls from participating in high school noncontact sports with boys); *Moritz* v. *C.I.R.*, 469 F. 2d 466 (C.A. 10), certiorari denied, 412 U.S. 906 (invalidating federal statute denying tax benefits to single males). Contra: *Wiesenfeld* v. *Secretary of Health, Education and Welfare*, 367 F. Supp. 981 (D. N.J.) (3-judge ct.) (mother's insurance benefits under the Social Security Act held discriminatory under compelling interest test). Compare *Healy* v. *Edwards*, 363 F. Supp. 1110 (E.D. La.) (3-judge ct.), probable jurisdiction noted, *Edwards* v. *Healy*, No. 73-759, February 19, 1974, (invalidating State statute exempting women from jury service who do not voluntarily register for it); *Aiello* v. *Hansen*, 359 F. Supp. 792 (N.D. Calif.) (3-judge ct.), probable jurisdiction noted, *Geduldig* v. *Aiello*, No. 73-640, February 17, 1973, (invalidating State statute excepting pregnancy-related work loss from unemployment insurance benefits).

It is particularly important in the context of this case that the courts accord to the legislature significant flexibility as to classification based on sex, because the issue here relates closely to the organization, maintenance, and effectiveness of the armed forces. In cases such as this the legislature's judgment as to military practicality requires deference. See U. S. Const., Art. I, Sec. 8, Cls. 12, 13 and 14; *Toth* v. *Quarles*, 350 U.S. 11, 17 ("primary business of armies and navies [is] to fight or be ready to fight wars should the occasion arise"); *Lichter* v. *United States*, 334 U.S. 742, 755-756 (conscription laws);

Orloff v. *Willoughby*, 345 U.S. 83, 94 (military considered a "specialized community governed by a separate discipline from that of the civilian"); *United States* v. *St. Clair*, 291 F. Supp. 122 (S.D. N.Y.) (draft laws do not unconstitutionally discriminate on the basis of sex).

This is not a rule like that held unconstitutional in *Frontiero* v. *Richardson*, *supra*, which denied fringe benefits to females solely for reasons of administrative convenience. Rather, this case involves policies closely related to the rate of promotion among younger officers and hence to the fighting morale and effectiveness of the armed forces.

In *Williams* v. *McNair*, 316 F. Supp. 134, 136-137 (D. S.C.), affirmed, 401 U.S. 951, the district court, in reviewing a sex classification statute in the civilian area (authorizing a State women's college), considered that any more stringent rule than the reasonable basis test "would mean that courts and not legislatures would determine [in these situations] all matters of public policy." The need to avoid such a function by the courts would apply *a fortiori* to questions involving the separate organization of men and women in the armed forces.[12]

[12] "It is not for the judiciary to review the legislative branch on the question of what military strength is necessary for the safety of the Nation, nor how the forces shall be raised, nor of what elements they shall be composed." *Bertelsen* v. *Cooney*, 213 F. 2d 275, 277 (C.A. 5), certiorari denied, 348 U.S. 856.

II

THE DIFFERENCES IN 10 U.S.C. 6382 AND 6401 ARE CONSTITUTIONAL

The different selection out rules of 10 U.S.C. 6382 and 10 U.S.C. 6401 are rationally related to reasonable and legitimate governmental interests and are therefore constitutional. We believe, in fact, that they can, though not required to do so, meet the more stringent test that they be supported by a compelling governmental interest. The differences in the two statutes are justified by the need to maintain a balanced and effective Naval officer corps. This is an appropriate, legitimate, and very important governmental objective.

The differences in the two statutes are based on a combination of complex factors, both historic and practical. The Navy, like the other military services, has traditionally been a male-dominated service;[12a] duty on board combatant vessels and aircraft is still

[12a] See Table I, *infra*, p. 21. As of September 30, 1973, a total of 15,034 lieutenants of the Navy serving on active duty (15,007 male and 27 female) were subject to the provisions of either 10 U.S.C. 6382(a) (9,990 regulars), or similar provisions of 10 U.S.C. 6389(a) (5,044 reserves); only 170 lieutenants (female) were subject to the provisions of 10 U.S.C. 6401. An additional 408 lieutenants of the Nurse Corps (76 male and 332 female) were subject to the provisions of 10 U.S.C. 6396(c) (166 regulars) or 10 U.S.C. 6397 (242 reserves), which are similar to 10 U.S.C. 6401. Temporary officers (including 546 temporary lieutenants) hold their appointments subject to termination by the President. 10 U.S.C. 5596(h).

restricted by statute to males, 10 U.S.C. 6015; male officers far outnumber female officers; and a system of orderly and assured promotion or selection out, based solely on fitness, has been considered by Congress to be essential for the maintenance of an efficient and motivated officer command structure. As of the present time Congress has not concluded that the services have arrived at the point where complete integration of male and female components, and the rules governing such components, can take place.[13]

1. 10 U.S.C. 6382 is part of a promotion system which governs most officers of the Regular Navy.[14] Competent line and staff officers of every rank are required in the operational units of the Navy (which are largely made up of combatant vessels) and in support, staff and specialized units. Congress fixes

[13] Had Congress believed that uniform treatment was required, it seems more likely that it would have made 10 U.S.C. 6382 applicable to women rather than extending, as the district court has done, the special provisions of 10 U.S.C. 6401 to men. Indeed, the Department of Defense has proposed elimination of 10 U.S.C. 6401 to Congress. See *infra*, page 18, n. 24.

[14] 10 U.S.C. 6382(a) governs all male lieutenants of the Regular Navy other than those in the nurse corps. It also governs women staff lieutenants of the Regular Navy in the medical, dental, judge advocate general, and medical service corps (appointed under 10 U.S.C. 5574, 5578, 5578a and 5579). It does not govern women line and staff lieutenants appointed under 10 U.S.C. 5590, nor lieutenants (male or female) of the Nurse Corps.

Reserve officers are subject to elimination from active status under conditions similar to those prescribed for separation of regulars. See 10 U.S.C. 6389, 6397.

by statute the total number of personnel in the Navy. *E.g.*, P. L. 92-436, Section 301, 86 Stat. 735; 86 Stat. 1184; H. Rep. No. 1389, 92d Cong., 2d Sess., p. 48; 10 U.S.C. 5403-5405, 5406-5409. In addition to reviewing the ratio of officers to enlisted persons, Congress has set by statute the distribution of the total number of unrestricted line officers within the various grades above lieutenant. See 10 U.S.C. 5442(a). The Secretary has discretion to determine the ratio, within the total number of remaining junior officers authorized, of lieutenants, lieutenants (junior-grade) and ensigns. 10 U.S.C. 5442(e). Promotions are based on merit and, in the case of most officers, on vacancies in the next higher grade. 10 U.S.C. 5707, 5756, 5769.[15] Separate promotion systems are established for unrestricted line officers (those eligible to command at sea), restricted line officers (those not eligible to command at sea), and for staff officers (supply, medical corps, etc.). See 10 U.S.C. 5769(b), 5773.

[15] Since the Secretary has discretion to determine the ratio of lieutenants, lieutenants (junior grade) and ensigns, the requirement of 10 U.S.C. 5756 that promotions to the next higher grade depend on vacancies in that grade is subject to administrative adjustment through adjustment of the number of officers prescribed for that grade. The Secretary has fixed the number of lieutenants at a number which creates fewer vacancies in a particular year than the number of lieutenants (junior grade) eligible for promotion. Attrition from lieutenant (junior grade) to lieutenant is accomplished largely by release of Reserve lieutenants (junior grade) to inactive duty (following completion of their active duty contracts), and also by the mandatory discharge of Regular lieutenants (junior grade) twice passed over. 10 U.S.C. 6382(b).

Thus officers generally compete for promotion against officers of similar experience for the more limited vacancies which exist in the next higher grade. The selection out rule for lieutenants twice passed over—10 U.S.C. 6382(a)—is a necessary part of a system designed to limit the Naval service to the best qualified, and to assure timely promotion of qualified younger officers.

Section 6382(a) is a reenactment of Section 312(h) of the Officer Personnel Act of 1947, 61 Stat. 860, which, in turn, was derived from Section 12(c) of the Act of June 23, 1938, 52 Stat. 949. See S. Rep. No. 2120, 75th Cong., 3d Sess., p. 10; H. Conf. Rep. No. 2764, 75th Cong., 3d Sess., p. 4.[16] It is an essential part of the Navy's merit system of promotion, first adopted in 1916. As described in the Senate Report, No. 2120, *supra*, at p. 4, that selection system

[16] Earlier reforms of the naval officer promotion system (which originally was based solely on seniority) were enacted by the Act of July 16, 1862, 12 Stat. 583; Act of Aug. 29, 1916, 39 Stat. 556; Act of Mar. 3, 1931, 46 Stat. 1482; and Act of May 29, 1934, 48 Stat. 814. "The basic objectives of the * * * [1947 Act] were to provide a better opportunity for a reasonable career to the well qualified officer, to provide for greater equality of promotion opportunities by producing a more positive flow of promotion, to create a practical method to accelerate the promotion of outstanding officers in all grades, and to meet the increased need for specialization in certain fields." Seymour, *Promotion of Officers in the Naval Service*, 1956 JAG Journal 5, 6. See also H. Rep. No. 640, 80th Cong., 1st Sess.

The parts of the Officer Personnel Act of 1947 affecting naval officers were codified in 10 U.S.C. 5401, *et seq.* by the Act of Aug. 10, 1956, 70A Stat. 1, 297.

> provides first for the distribution of the total number of the officers by given percentages of the whole number in the several grades or ranks, fixed according to the needs of the Navy for officers of these respective grades of responsibility. These percentages, and the resultant numbers, are smaller for the upper ranks, since there are fewer officers needed in these higher grades, and more in the lower. The decrease in number from grade to grade is greater than the wastage, or attrition, through death, resignation, and physical disability retirement, of the graduating classes from the Naval Academy as they progress through their naval careers. In consequence it is impossible, without serious stagnation of promotion and its resultant delay in the progressive development of the abilities of officers through increasing responsibilities, to promote through all grades the surviving members of the original Naval Academy classes. * * *

10 U.S.C. 6382(a) meets these problems by establishing a mandatory attrition requirement for lieutenants twice passed over for promotion, thus permitting an even flow of promotion for most officers of the Navy through the grade of lieutenant.[17] Similar statutes provide for the retirement of officers higher than lieutenant who are twice passed over.[18]

[17] 10 U.S.C. 6382(b) requires the separation with severance pay of lieutenants (junior grade) who are twice passed over for lieutenant.

[18] See 10 U.S.C. 6380 (lieutenant commanders); 6379 (commanders); 6376 (captains). Retirement (with retirement pay) in lieu of discharge is justified because these officers are close to or are eligible for retirement. 10 U.S.C. 6381.

During normal peace-time conditions it is expected that a male lieutenant would complete about 13 years of commissioned service before he was passed over twice.[19] But Congress has permitted an acceleration of promotions for male officers to meet the rising need for officers during war-time conditions, as in the case of the recent conflict in Southeast Asia.[20] That conflict, and prior periods of international tension, have had the effect of reducing the promotion time for lieutenants, and the selection out time for those passed over twice, to eight or nine years.[21] In the post-war period the opposite trend may be expected, when the oversupply of officers created by the war is reduced. In these circumstances the selection out statutes applicable to male officers continue to serve a necessary purpose. A 13-year selection out period for twice passed over male lieutenants would

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Petitioner had prior enlisted service (J.S. App. B, p. 13a), and hence is close to retirement. His situation, however, is atypical. See Fink affidavit (App. 21a).

[19] See Section 308(a)(13) of the Officer Personnel Act of 1947, 61 Stat. 846; now 10 U.S.C. 5768(a) (12 year normal total commissioned service for male line lieutenants). Those lieutenants considered for promotion to lieutenant commander for the *second* time would attain 13 years of commissioned service. See Fink affidavit (App. 20a-21a). Connally affidavit (App. 10a).

[20] See 10 U.S.C. 5751(b), which fixes minimum service-in-grade requirements for consideration for promotion. (This section was suspended by the President in 1968 under the authority of 10 U.S.C. 5785(b). See Executive Order No. 11437, Dec. 2, 1968, 33 Fed. Reg. 17945.)

[21] Connally affidavit (App. 11a).

be detrimental to the needs of the service, and would be inconsistent with maintenance of a highly qualified and competitive Naval officer corps. The number of promotion opportunities for the grade of lieutenant would be lessened if twice passed over lieutenants were allowed to continue serving in that grade, in view of the requirement that promotion of lieutenants (junior grade) depend on vacancies by attrition or promotion in lieutenant ranks.

2. 10 U.S.C. 6401 is part of a separate promotion system which governs a relatively small number of women line and staff lieutenants in the Navy.[22] Under Section 6401 these lieutenants are presently subject to the same 13-year service tenure originally enacted in 1948 as the practical equivalent then to the peace-time selection out time for male lieutenants

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[22] 10 U.S.C. 6401(a) applies to women line and staff lieutenants on the active list (regulars appointed under 10 U.S.C. 5590). A similar statute applies to men and women lieutenants in the Nurse Corps (appointed under 10 U.S.C. 5580). 10 U.S.C. 6396(c). Both of these statutes operate if the lieutenant involved is "not on a promotion list" during the fiscal year in which 13 years of service is completed, requiring discharge at that time even if the lieutenant was never considered for promotion (rather than considered and passed over twice). See Fink affidavit (App. 21a). Women staff lieutenants of the medical, dental, judge advocate general, and medical service corps (appointed under 10 U.S.C. 5574, 5578, 5578a and 5579) are subject to the same attrition statute which applies to male lieutenants (10 U.S.C. 6382). See *supra*, p. 12, n. 14. Reserve women lieutenants (line, Staff, and Nurse Corps) are subject to elimination from active status under conditions similar to those prescribed for separation of regulars in these components. See 10 U.S.C. 6403, 6389, 6397.

twice passed over.[23] Congress may decide to amend this provision to conform to the selection out rules applicable to male lieutenants.[24] However, Congress has not yet done so, presumably because the retention for 13 years of women lieutenants (who have been passed over twice or otherwise have not been promoted) has not been considered inconsistent with the needs of the Naval service.[25] The lack of equivalent promotional opportunity for women in the past,[26] the relatively small number of women officers in the

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[23] 10 U.S.C. 6401, originally enacted as Section 207(j) of the Women's Armed Services Integration Act of 1948, 62 Stat. 368, was so explained in Hearings before the Senate Committee on Armed Services, on S. 1103, S. 1527, and S. 1641, 80th Cong., 1st Sess., p. 39.

[24] The Department of Defense has submitted to the Congress a unifying bill which would, *inter alia*, substitute for Section 6401 the same provisions which govern Navy lieutenants generally (Section 6382). See Sections 2(5) and 4 (18)(L) of H.R. 12405 (93d Cong., 2d Sess.) (substituting a proposed new 10 U.S.C. 630 for 10 U.S.C. 6382 and 6401), pp. 41-42, 136. The Department of Defense considers that the separate rule for women, while serving a legitimate governmental purpose (providing additional career security for women officers of the Navy) is on balance no longer needed as a matter of military personnel policy. The bill is now pending before the House Armed Services Committee.

[25] The 1967 Act relating to women members of the armed forces made no changes to Section 6401. S. Rep. No. 676, 90th Cong., 1st Sess., p. 13.

[26] Women line and staff officers lack the combatant and sea duty of male officers, see 10 U.S.C. 6015, and accordingly have not only less competitive advantage as against line and staff male officers, but fewer command positions to which they could be promoted. See Kinnear affidavit (App. 28a). Since 1967 and within the women's promotion system, the Secretary

service,[27] and the public interest in increasing rather than decreasing the overall number of women in the armed forces, are substantial reasons in support of the differences in question.[28]

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of the Navy has initiated, as a matter of personnel policy, a program to accelerate the promotion of women, as authorized by 10 U.S.C. 5752. Today, because of Secretarial policy, women are considered for promotion within the same time periods as men.

[27] See *supra*, p. 5, n. 7, and the more recent statistics set forth in the addendum (Table I, *infra*, p. 21).

[28] In 1967 Congress repealed the prior restrictions on overall number of women in the Navy (enlisted and officers), restrictions against promotion to captain, and age limitations, and authorized the promotion of women, in certain circumstances, to flag rank. See Sections 1(14), 1(16), 1(18)(L), 1(19) and 1(24) of the Act of Nov. 8, 1967, 81 Stat. 374; S. Rep. No. 676, 90th Cong., 1st Sess. As a result, greater promotional opportunity will be available to women, with a consequent lessening of the necessity for Section 6401. However, it should be up to Congress, not the Courts, to determine when the objective of stabilizing career opportunities for women officers of the Navy, in the manner prescribed by Section 6401, is no longer necessary.

A 13-year tenure for women lieutenants does not jeopardize promotion of women lieutenants (junior grade), since all women lieutenants (junior grade) are eligible for promotion to lieutenant, regardless of the number of lieutenants, 10 U.S.C. 5760(b); Connally affidavit (App. 11a). By contrast, the Secretary must limit promotion of male lieutenants (junior grade) to vacancies existing in the lieutenant ranks. See *supra*, p. 13, n. 15.

Indeed, the differing ground rules governing the majority of women officers of the Navy, none of which are questioned here, strongly suggest that the two sexes are not "similarly situated," for purposes of invoking any claim of invidious discrimination. See *Wark* v. *Robbins*, 458 F. 2d 1295 (C.A. 1) (different penalties for escape from men's and women's prisons).

Accordingly, the distinction between 10 U.S.C. 6401 and 10 U.S.C. 6382 is constitutional.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be reversed.

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TABLE I

OFFICERS OF THE NAVY SERVING ON ACTIVE DUTY AS OF SEPTEMBER 30, 1973

(Derived from information prepared by Personnel Statistics Branch, Bureau of Naval Personnel, Department of the Navy, and appearing in tables reproduced in NAVPERS 15658)

Class		Component (and appointing authority-Regulars)	TOTAL OFFICERS: Regular[t] (incl. Temporary)	TOTAL OFFICERS: Reserve[r] (10 USC 591)	TOTAL OFFICERS: Total Officers	LIEUTENANTS: Subject to separation under 10 U.S.C. 6382(a) or similar statute: Regular (10 USC 6382(a))	LIEUTENANTS: Subject to separation under 10 U.S.C. 6382(a) or similar statute: Reserve (10 USC 6389(a))	LIEUTENANTS: Subject to separation under 10 U.S.C. 6382(a) or similar statute: Total	LIEUTENANTS: Subject to separation under 10 U.S.C. 6401 or similar statute: Regular	LIEUTENANTS: Subject to separation under 10 U.S.C. 6401 or similar statute: Reserve	LIEUTENANTS: Subject to separation under 10 U.S.C. 6401 or similar statute: Total	LIEUTENANTS: Temporary lieutenants—serve subject to 10 USC 5596(h)	LIEUTENANTS: Total Lieutenants
MALE OFFICERS	1.	Unrestricted line (10 USC 5572)	28,363	9,967	38,330	7,586	1,577	9,163	—	—	—	—	9,163
	2.	Restricted line (10 USC 5587, 5589)	6,260 (1396)	872	7,132	807	214	1,021	—	—	—	412	1,433
	3.	Staff—SC, CC, CEC (10 USC 5575, 5576, 5577, 5589)	5,106 (144)	1,616	6,722	959	281	1,240	—	—	—	35	1,275
	4.	Staff—MC, DC, JAGC, MSC (10 USC 5574, 5578, 5578a, 5579)	3,880 (388)	4,372	8,252	627	2,956	3,583	—	—	—	99	3,682
	5.	Staff—Nurse Corps (10 USC 5580)	69	235	304	—	—	—	39 (10 USC 6396(c))	37 (10 USC 6397)	76	—	76
	6.	Total Men	43,678 (1928)	17,062	60,740	9,979	5,028	15,007	39	37	76	546	15,629
WOMEN OFFICERS	7.	Line (10 USC 5590)	497	348	845	—	—	—	165 (10 USC 6401)	0 (10 USC 6403)	165	—	165
	8.	Staff—SC, CC, CEC (10 USC 5590)	15	18	33	—	—	—	5 (10 USC 6401)	0 (10 USC 6403)	5	—	5
	9.	Staff—MC, DC, JAGC, MSC (10 USC 5574, 5578, 5578a, 5579)	46	53 (10 USC 5581)	99	11	16	27	—	—	—	—	27
	10.	Staff—Nurse Corps (10 USC 5580)	673	1,434	2,107	—	—	—	127 (10 USC 6396(c))	205 (10 USC 6397)	332	—	332
	11.	Total Women	1,231	1,853	3,084	11	16	27	297	205	502	—	529
TOTAL	12.	Total Officers	44,909 (1928)	18,915	63,824	9,990	5,044	15,034	336	242	578	546	16,158

Notes

[t]—Temporary officers, appointed under 10 U.S.C. 5596, are included with regulars, and are separately indicated in parenthesis.

[r]—All reserves are appointed under 10 U.S.C. 591, except reserve women of the Medical, Dental, Medical Service and Judge Advocate General Corps, who are appointed under 10 U.S.C. 5581.

SC —Supply Corps
CC —Chaplain Corps
CEC—Civil Engineering Corps
MC —Medical Corps
DC —Dental Corps
JAGC—Judge Advocate General Corps
MSC—Medical Service Corps

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